No. 35

In the Supreme Court of the United States

OCTOBER TERM, 1944

GUSTAV H. KANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 232–237) is reported at 140 F. (2d) 380.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 4, 1944 (R. 237). The petition for a writ of certiorari was filed on March 4, 1944, and was granted on April 10, 1944 (R. 238). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the evidence was sufficient to establish (a) a scheme to defraud and petitioner's participation therein, and (b) use of the mails for the purpose of executing such scheme.

STATUTE INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular,

pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

Petitioner and six others were indicted in the United States District Court for Maryland in three counts charging use of the mails in execution of a scheme to defraud, in violation of Section 215 of the Criminal Code (18 U. S. C. 338). The indictment charged, in essence, that the defendants, all of whom were officers and employees of Triumph Explosives, Inc., and two of whom, petitioner and Decker, were directors, devised a scheme to defraud Triumph and its stockholders of a large part of its profits by creating a corporation known as the Elk Mills Loading Corporation, subletting to it Triumph's contracts with the Government for the manufacture of ordnance supplies, and distributing a large part of the diverted profits to the defendants in the form of salaries, dividends, bonuses, and the like (R. 1–11).

Petitioner's codefendants pleaded *nolo contendere* (R. 13). Petitioner was tried alone, was convicted on the second and third counts,[1] and was sentenced to imprisonment for three years and payment of a $2,000 fine (R. 11). On appeal to the Circuit Court of Appeals for the Fourth Circuit, his conviction was affirmed (R. 237).

[1] The first count was abandoned by the Government at the trial (R. 38).

The evidence may be summarized as follows:

Triumph Explosives, Inc., was a Maryland corporation whose stock was widely held by the public (R. 20). Petitioner was its president and director; his codefendant Decker was vice-president and director;[2] and the other five defendants (Feldman, Prial, Willis, Deibert, and William L. Kann, Jr.) were administrative and executive employees of Triumph (R. 14–15, 19, 84, 191). In the fall of 1941, Triumph was engaged in producing ordnance supplies for the Army and Navy (R. 184). On November 27, 1941, it was awarded a large contract with the Chemical Warfare Service of the War Department for the production of incendiary bombs (R. 14). Performance of this contract would have necessitated capital expenditures on the part of the company, including acquisition of additional land, erection of buildings, and purchase of machinery and equipment (R. 14).

On December 2, 1941, at the request of William L. Kann, Jr., petitioner's nephew, Triumph's attorney organized a corporation known as the Elk Mills Loading Corporation (R. 140–141, 144). Petitioner testified that on December 3, 1941, he received a memorandum from Feldman, one of the employee defendants, suggesting a plan for the

[2] The other directors were William L. Kann, petitioner's brother; I. A. Diamondstone, petitioner's brother-in-law; R. V. Criswell; Van Dyk MacBride; and Colonel A. P. Shirley (R. 19, 35, 191).

organization of Elk Mills as an independent corporation to carry out the incendiary bomb contract, the stock to be owned by petitioner, Decker, and five "key" employees (R. 165–166; see R. 147–148). That plan was disapproved, however, by petitioner's brother-in-law, Weil, a lawyer, who informed petitioner that in his opinion Triumph's directors could not legally own stock in a corporation which expected to obtain a subcontract from Triumph (R. 149).

At a special meeting of Triumph's board of directors on December 11, 1941, a majority of the board—petitioner, Decker, William L. Kann (petitioner's brother) and Criswell—approved a new plan under which 45 percent of the stock of Elk Mills was to be issued to the five employee defendants, who were personally to acquire and deed to Elk Mills a suitable site for the erection of a plant. Fifty-five percent of the stock of Elk Mills was to be issued to Triumph in consideration of its subletting the incendiary bomb contract and transferring to Elk Mills advance payments to be received from the Government. The reasons for the proposed arrangement, as set forth in the minutes of the meeting, were that, under Triumph's loan agreement with the Peoples Pittsburgh Trust Company and the Federal Reserve Bank of Cleveland, Triumph was not authorized to make the capital expenditures required to fufill the contract, and, furthermore,

that the five employees to whom the 45 percent of the Elk Mills stock was to be issued were threatening to leave because of dissatisfaction with their compensation from Triumph, which could not be increased without the consent of the banks. (R. 13–17.) The Elk Mills arrangement was made subject to the approval of the banks (R. 16), which subsequently took the position that the plan was not in violation of their loan agreement (R. 104, 108). The banks were never requested to authorize Triumph either itself to make the capital expenditures required under the contract, or to increase the salaries of the allegedly dissatisfied employees (R. 113–114, 160). The loan agreement between the Peoples Trust Company and Triumph provided for the bank's approval of increases of salaries over $3,000 per year and for a limitation of capital expenditures to $300,000, most of which had already been expended prior to the award of the incendiary bomb contract (R. 99–100, 112). However, the bank customarily authorized increases in salary requested by Triumph (R. 98–99), and prior and subsequent to the organization of Elk Mills, it authorized increases in salaries for some of the "key" employees (R. 121–122). A few months subsequent to the organization of Elk Mills, prior to March 17, 1942, the bank approved a payment by Triumph of substantial bonuses to some of these employees (R. 124), and shortly thereafter permitted the payment of bonuses in a sum not

exceeding $30,000 (R. 125). Moreover, between March and December 1941 the bank had increased the amount of Triumph's authorized capital expenditures from $160,000 to $300,000 (R. 99, 116–117), and in May 1942 increased the authorized amount to $650,000 (R. 119).

The stock of Elk Mills was issued in accordance with the approved arrangement, and officers and directors of Elk Mills were elected. Petitioner, his nephew, and Decker constituted a majority of Elk Mills's board of directors (R. 78–79). At another special meeting of Triumph's board of directors on March 17, 1942, the subcontract to Elk Mills was modified to provide that Triumph would furnish its employees to Elk Mills and would also provide light, heat, and other services necessary for the performance of the bomb contract, receiving as compensation five cents for each bomb produced (R. 17–19). The minutes of the meeting record five directors as present (R. 17). Two directors, who were present during most of the meeting, heard no discussion of the Elk Mills transaction and did not become aware of the existence of Elk Mills until October 1, 1942 (R. 20–21, 23–24, 27, 32, 33). Another director, who was absent from the meeting, was not informed of Elk Mills's existence until October 1, 1942 (R. 35). Under Triumph's bylaws, the three remaining directors (two of whom were petitioner and Decker) present at the March 17 meeting did not constitute a quorum (R. 72). Moreover, the

notices of the special meetings of December 11, 1941, when the Elk Mills arrangement was approved, and of March 17, 1942, when the contract was modified, contained no reference whatsoever to Elk Mills (R. 73–74) even though Triumph's bylaws required that notice be given of the business to be transacted at special meetings (R. 72).

On January 2, 1942, at the organization meeting of Elk Mills, a salary of $5,200 annually was voted to each of the defendants either as officers or consultants of the Company (R. 79–81). This action, taken when the corporation had no assets and was engaged in no active business of any kind, was criticized by petitioner's brother-in-law, Weil, who, in a letter to petitioner dated February 11, 1942, suggested that the fixing of merely nominal salaries for petitioner and Decker might save them from possible accusations that the formation of a subsidiary was only a device to provide them with additional compensation (R. 132–137). Nevertheless, the salaries were not rescinded (R. 128); instead, on May 27, 1942, less than six months after the organization of Elk Mills, and at a time when no substantial payment had been made on the purchase price of the Elk Mills site (see *infra*, pp. 9–10), the directors of Elk Mills voted a bonus of $5,000 to each of the defendants and Criswell, allegedly in recognition of their work in eliminating delays in production (R. 82–83). Elk Mills then had $1313.12 in its bank account (R.

87). Triumph advanced $40,000 on the subcontract to Elk Mills, and a few days thereafter the $40,000 was paid to the defendants and Criswell in the form of bonus checks (R. 85–87). The check of the defendant Willis was deposited in his bank at Newark, Delaware, and was mailed by that bank to the Peoples Bank at Elkton, Maryland, on which it was drawn (R. 37–38). The mailing of this check forms the basis of the third count of the indictment (R. 9–10A).

The plan approved by Triumph's directors on December 11, 1941, called for the acquisition of a building site by the employee defendants, and the conveyance of such site to Elk Mills as consideration for the issuance to them of 45 percent of the Elk Mills stock (R. 17); and the minutes of the January 2, 1942, organization meeting of Elk Mills record the acceptance of an offer by these persons to sell a tract of land to Elk Mills in consideration of the issuance to them of 3150 shares of the common stock of Elk Mills (R. 81). In fact, however, the negotiations for the purchase of the property were made by Decker who had for years been trying to acquire this particular site (R. 39–40). On December 29, 1941, Triumph made a down payment of $250 on the property (R. 39); and on March 11, 1942, Triumph paid $500 to the broker as commission for arranging the purchase of the land (R. 40). A deed to Triumph was executed by the vendors on June 18, 1942, but some diffi-

culty developed in the title with the result that the balance of the purchase price, $10,980, was not paid until October 1, 1942 (R. 41–42, 67). When title to the property was about to be cleared, Forrestell, Triumph's attorney, obtained checks for their share of the purchase price from the individual owners of the Elk Mills stock but was directed by Sabel, Triumph's auditor, to use Triumph's check to pay for the land, apparently for the reason that the entire Elk Mills transaction had been discovered by Commander Seidman, a Navy Department auditor, and consequently was about to be rescinded (R. 193, 196–198; see R. 75–76, 77–78). A deed to the property from Triumph to Elk Mills, dated October 1, 1942, was never recorded (R. 42, 67).

About February 1, 1942, after the contract for the sale of the land had been signed by Triumph but before any effort to take title had been made, several of the individual owners of Elk Mills' stock directed the contractor who was erecting a building on the site to use timber taken from the land in the construction of the building (R. 47–48, 67). The cost of cutting the timber was paid by Triumph (R. 94). Nevertheless, the individual owners of the Elk Mills stock billed the contractor for $12,062.18 worth of timber (R. 50, 54, 55, 59–60, 68). The contractor, who, before receiving this bill, had substantially completed his work and had made no charge for the lumber taken from the land (R. 48, 49, 50, 51, 52, 59, 67), billed Triumph

for that amount (R. 48, 51, 54, 68). On July 21, 1942, in the presence of the contractor, William L. Kann, Jr., asked petitioner whether it was "all right to pay this lumber bill," and petitioner replied that he did not see why the bill should not be paid (R. 55–56, 57, 63–64). About an hour later William L. Kann, Jr. delivered to the contractor Triumph's check for $12,062.18 (R. 54, 64). The contractor then gave William L. Kann, Jr. his (the contractor's) check for $12,062.18, made payable, at William L. Kann, Jr.'s direction, to the five employee defendants (R. 55, 56–57, 64, 68). This check, dated July 22, 1942, drawn on a bank at Wilmington, Delaware, where the contractor lived, was cashed by the payees at the Peoples Bank of Elkton, Maryland, and was deposited by that bank in the United States mails, to be delivered to the Wilmington bank on which it was drawn (R. 37). The mailing of this check forms the basis of the second count of the indictment (R. 7–8A).

Elk Mills, from the time of its inception to July 31, 1942, received $600,000 from Triumph on the incendiary bomb contract (R. 94, 129). The net profit of Elk Mills as of July 31, 1942, after salaries and bonuses had been paid but before taxes were deducted, was in excess of $290,000, largely in the form of fixed assets (R. 94, 129). Nevertheless, petitioner, when questioned at a meeting with the Navy Department's Price Adjustment Board, had stated that Elk Mills profits were 10%

(R. 90). As of July 31, 1942, Elk Mills had $4,000 in the bank (R. 129). It had paid out $69,000 to the defendants as salaries and bonuses (R. 128).

In August 1942, the Navy Price Adjustment Board instituted an investigation of Triumph and its subsidiaries (R. 89). Its investigators uncovered the lumber deal (*supra*, pp. 10–11), and questioned petitioner and others concerning it. Petitioner denied any knowledge of the deal, but stated that all parties would be willing to undo what had been done. (R. 93.) When a Navy Department investigator questioned the necessity for the organization of Elk Mills, in order to satisfy the "key" employees, Weil, in the presence of petitioner and Decker, admitted that petitioner, Decker, Willis, and Kann, Jr., would not have left the employ of Triumph, and that only three employees were threatening to resign (R. 92). After the Navy Department took over the operation of Triumph's plant, petitioner and his codirectors resigned (R. 24), and the five individual stockholders of Elk Mills transferred their stock to Triumph (R. 23, 88).

SUMMARY OF ARGUMENT

There was substantial evidence to establish the existence of (a) a scheme to defraud and petitioner's participation therein, and (b) use of the mails for the purpose of executing such scheme.

I

Petitioner does not deny that he knew of and took an active part in the general scheme for the organization of Elk Mills and the subletting to it of the incendiary bomb contract. The question whether Elk Mills was a legitimate business device necessitated by the provisions of Triumph's loan agreement with the banks, as petitioner contends, or a means of diverting to the defendants profits which otherwise would have inured to Triumph and its stockholders, as the Government sought to prove at the trial, was submitted to the jury under a charge which carefully reviewed the evidence and which stressed intent as the most important element to be considered in determining the true purpose of the arrangement. There was abundant evidence to support the Government's theory. The jury was entitled to infer that Triumph's loan agreement with the banks merely provided a convenient pretext for the Elk Mills scheme.

The lumber deal was admittedly fraudulent. In essence, it was a scheme whereby the five "key" men could acquire forty-five per cent of the stock of Elk Mills in an apparently legitimate manner without actually paying for it. Petitioner did not try to justify this transaction to the jury. He claimed merely that he had no knowledge of the scheme until it was uncovered by the Navy Department auditors. His contention in this respect

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was fairly summarized in the trial court's charge, and was resolved against him by the jury's verdict of guilt. The evidence amply supported the jury's conclusion.

II

Since none of the defendants actually mailed the checks which formed the basis of the indictment, the Government was required to prove that the defendants caused the mails to be used, and that such use of the mails was in execution or in furtherance of the fraudulent scheme. It is well settled that a person may cause the use of the mails even though he himself does not perform or direct the act of mailing. If he intentionally sets in motion a train of circumstances which have as their natural and probable consequence the use of the mails, the act of mailing, although by an innocent instrumentality, is his act for which he may be held criminally responsible. Whether, under the circumstances of a particular case, the use of the mails could reasonably have been foreseen is clearly a question of fact for determination by the jury.

Although petitioner himself did not cash or deposit the checks, he was responsible for their mailing. The trial court properly instructed the jury that, if the scheme to defraud contemplated use of the mails, petitioner was liable for mailings performed or caused by his codefendants in execution of the scheme, even though he may not have

known of the particular use of the mails which forms the basis of the prosecution. The evidence clearly permitted the jury to infer that the mails would be used for the purpose of forwarding checks given as part of the proceeds diverted from Triumph.

It is not disputed that the use of the mails must, in some manner, be in execution or in furtherance of the scheme to defraud, and that, if the scheme has already ended, a subsequent mailing can not constitute the crime. The question whether the scheme was still alive when the mailings occurred depends upon all the circumstances, including the nature of the scheme, the intention to obtain further funds, and the means employed to avoid detection. In the present case there was ample evidence that the use of the mails charged in the indictment was in furtherance of an existing scheme. The scheme, as a whole, was one of diverting profits from Triumph and its stockholders to the defendants through salaries, bonuses, dividends and the like. It was intended to continue at least as long as Elk Mills was performing the incendiary bomb contract. The appearance of legitimacy was thus of the essence of the scheme. The bonus check forming the basis of the third count of the indictment was only one of a series of checks intended to be issued for salaries, bonuses or dividends. It was essential to the continued success of the scheme that all such

checks should clear in routine, uneventful manner as apparently proper obligations of Elk Mills. Consequently, the successful clearance of the bonus checks was part of the whole fraudulent process: it enabled the defendants to conceal their fraud, and to gain time to perpetrate future frauds. The mailing of the bonus check was properly found, therefore, to be in execution of the scheme.

The jury found that the use of the mails in clearing the "lumber deal" check was also in execution of the scheme to defraud. This check was given by the contractor to the five defendants who were the individual owners of the Elk Mills stock ostensibly in payment for lumber owned by them. The evidence provided ample support for this finding. It was a fair inference from the evidence that the payees of the check intended to utilize this means of getting the money to pay for the land, which in turn was to be used as the consideration for forty-five per cent of the Elk Mills stock. The use of the mails to clear this check was, therefore, an integral step in the effectuation of the scheme. It cannot be said that the payees of this check, upon receiving payment upon it, were thereafter not concerned whether or not the check cleared. They were not absconders, not caring what happened after they cashed the check; these defendants had responsible positions with Triumph, all lived in the vicinity of Elkton, and would have had to make the check good if it had

not been paid when presented through the mails by the Elkton bank for payment. Their scheme was not complete when they obtained the cash on this check; it was only beginning.

ARGUMENT

I

THERE WAS SUBSTANTIAL EVIDENCE TO ESTABLISH THE EXISTENCE OF A SCHEME TO DEFRAUD AND PETITIONER'S PARTICIPATION THEREIN

Petitioner challenges the sufficiency of the evidence to establish the existence of a scheme to defraud, and his knowing participation therein. He does not deny that he knew of and took an active part in the general scheme for the organization of Elk Mills and the subletting to it of the incendiary bomb contract, but argues (Br. 20–25) that Elk Mills was a legitimate business device necessitated by the provisions of Triumph's loan agreement with the banks. However, the issue of fraud was submitted to the jury under a charge which carefully reviewed the evidence, and which stressed intent as the most important element to be considered in determining the true *raison d'être* of the Elk Mills arrangement. With respect to the nature of the general scheme, the trial judge charged the jury (R. 215):

> * * * so far as what was done is concerned, there isn't much of a controversy as to the facts. The controversy is over the

> question as to whether there was the fraudulent intent in the matter. Was this organization of the Elk Mills Corporation a bona fide thing, done without any intent to defraud anybody, as an ordinary corporate matter dictated by the practical business necessities of the case? Or was it used merely as a sham, a pretense, as a scheme to siphon off, as the Government counsel has expressed it, profits which would ordinarily have inured to the benefit of the Triumph Company and its stockholders? In other words, were the defendants named in this case, particularly the defendant on trial, Mr. Kann, was he acting honestly in this matter, or was he acting fraudulently? Did he have a scheme or was he a party to a scheme to defraud the stockholders of the Triumph Company, or was he engaged in perfectly good faith in an ordinary business corporate activity? That is a question for you gentlemen to decide on the facts.

The judge specifically called the jury's attention to the defendants' justification of the Elk Mills scheme (R. 219–220) as it was set forth in Triumph's minute books (R. 14–17), in Weil's letter to the bank seeking approval of the scheme (R. 105–108), and in petitioner's and Weil's testimony (R. 151–155, 166–170). That justification is again urged here by petitioner: that Triumph could not fulfill the bomb contract without capital expenditures, that because of its recent difficulties with the bank, there was no hope of obtaining permis-

sion to expend the required funds, that its "key" men were threatening to leave Triumph's employ unless their salaries were raised, and that under the loan agreement their salaries could not be raised.

There was other evidence, however, tending to contradict this explanation of the scheme. The bank customarily approved Triumph's requests for permission to grant increases in salaries, and, in fact, approved such increases for the "key" men both before and after the organization of Elk Mills (see *supra*, p. 6). Of the five employees who were allegedly threatening to resign in order to compete with Triumph, one was petitioner's nephew and another was a relative of Mr. Decker. There was no evidence that these employees had sufficient assets or credit to enable them to organize a competing organization, and the Government contract had already been awarded to Triumph. Furthermore, the bank subsequently acquiesced in the Elk Mills arrangement, and the letter from its attorneys advising acceptance of the proposal, even if it should constitute a violation of the loan agreement, indicates that the bank would have agreed to almost any plan which would have enabled Triumph to perform its Government contracts.[3] The bank had

[3] The bank's attorneys after expressing the opinion that the proposed plan was not technically a violation of the loan agreement stated:

"And even if the participation of the ownership of the Company should be prohibited by the agreement, we do not

previously approved increased capital expenditures by Triumph, and six months after the Elk Mills project was started, the bank entered into a new agreement with Triumph whereby the latter's authorization for capital expenditures was more than doubled (*supra*, p. 7). On these facts alone, considered as they must be in the light most favorable to the Government,[4] the jury was entitled to infer that the loan agreement merely provided a convenient excuse for the Elk Mills scheme.

Even if it be assumed that the organization of a subsidiary corporation to perform the bomb contract might have been justifiable under the circumstances, the jury was nevertheless entitled to find that Elk Mills as actually organized and conducted was a scheme to defraud. The mere fact that petitioner and his codefendants utilized a device which

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believe, as a practical matter, that your company could afford to declare a default in its loan. If the loans were to be called, the company would be faced with either ruination or Government operation of its plant, or with the necessity of financing its contracts, or financing elsewhere. If it were possible to force the Company to breach the contract with the Government and we have this default, severe penalties or Government operation might be the result. Either action, therefore, would not improve the present position of your loans. The matter, of course, should be submitted to the Federal Reserve Bank, who will no doubt wish to have their attorneys pass upon it." (R. 104.)

[4] *Glasser* v. *United States*, 315 U. S. 60, 80; *United States* v. *Manton*, 107 F. (2d) 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Bogy* v. *United States*, 96 F. (2d) 734, 740 (C. C. A. 6), certiorari denied, 305 U. S. 608.

might have been legitimate does not exonerate them from using such a device as the vehicle for a scheme to defraud. *Holmes* v. *United States,* 134 F. (2d) 125, 134 (C. C. A. 8), certiorari denied, 319 U. S. 776; *Watlington* v. *United States,* 233 Fed. 247, 249 (C. C. A. 8), certiorari denied, 242 U. S. 645; *Bettman* v. *United States,* 224 Fed. 819, 824 (C. C. A. 6), certiorari denied, 239 U. S. 642. Compare *Wardell* v. *Railroad Company,* 103 U. S. 651.

The evidence was such that the jury could reasonably find that Elk Mills was devised as a method of diverting to the defendants profits which would otherwise have inured to Triumph and its stockholders. The defendants had turned over a million-dollar contract of Triumph, whose stock was owned by the general public, to Elk Mills, a corporation created by them, in which no capital investment was made, 45% of whose stock was held by five of the defendants, and had thereby caused Elk Mills in six months to make a profit of almost $300,000.

That petitioner and his codefendants realized that their scheme was fraudulent is indicated by the manner in which the Elk Mills transaction was treated by Triumph's board of directors. The bomb contract was awarded on November 27, 1941. According to petitioner's own version of his dealings with Feldman, one of the "key" employees, the proposal to have the contract per-

formed by a subsidiary corporation was discussed at least as early as December 3 (*supra*, p. 4). Yet the notices of the special meeting of the board of directors, which were sent out on December 8, contained no suggestion that so important a question as the organization of a subsidiary corporation was to be discussed. Even more significant on the question of fraudulent intent is the March 17, 1942, special meeting at which the modification of the Elk Mills contract was approved. (See *supra*, p. 7.) By that time Elk Mills had already been organized. If there were no illicit purpose to be concealed, it is difficult to explain why there should have been no reference to Elk Mills in the notice of that meeting or why the modification of the Elk Mills contract should not have been openly discussed at the meeting itself. It is true that directors MacBride and Shirley, when they testified as to their unawareness of the Elk Mills' scheme at Triumph's October 7, 1942, meeting, stated that they had left the March 17 meeting before its conclusion (R. 23–24). However, according to the minutes of the March 17 meeting, the modification of the Elk Mills contract was approved before Shirley gave his report with regard to the tire and rubber situation. MacBride recalled having heard that report. (R. 26–27.) Plainly, therefore, if the minutes of the March 17 meeting were a true record of what had actually occurred, these

two directors would have known of the existence of Elk Mills and of the fact that it had a subcontract with Triumph.

Finally, the haste with which petitioner and his codefendants utilized Elk Mills to award to themselves substantial salaries and bonuses, entitled the jury to infer that the scheme was stamped with the badge of fraud. Weil's letter to petitioner clearly put the latter on notice that the voting of salaries of $5,200 annually to petitioner and Decker was likely to be regarded as a fraud upon the stockholders of Triumph (*supra*, p. 8). The board of directors of Elk Mills nevertheless not only did not rescind the salaries, but voted themselves and their associates an additional bonus of $5,000 each. Petitioner's own account of his activities on behalf of Elk Mills (R. 180–181)—unsuccessful efforts to obtain credit standing for a corporation which was receiving large advance payments made by the Government to Triumph—shows that there was no actual justification for awarding him a bonus, particularly since two months earlier Triumph had voted substantial bonuses to petitioner, Decker, and some of the others.[5]

The lumber deal was admittedly fraudulent.

[5] The bonus award by Triumph was cancelled before payment (R. 126–127), but the subsequent rescission does not detract from the probative value of these awards on the question of petitioner's intent to divert Triumph's war profits to the personal use of himself and his associates.

In essence, it was a scheme whereby the five "key" men could acquire 45 percent of the stock of Elk Mills in an apparently legitimate manner without actually paying for it. Under the arrangement approved by Triumph's board of directors, these employees were personally to acquire the land for the Elk Mills building. The lumber deal was their method of getting the money to pay for the land. It appears, from the testimony of Forrestell, Triumph's attorney, that the five men probably intended to use the money obtained from the sale of the lumber to pay the purchase price of the land (*supra*, p. 10), but it is not disputed that, even so, the ultimate result would have been that these men would have acquired their share of the Elk Mills stock without expenditure of their own funds. Petitioner did not try to justify this transaction either to the Navy Adjustment Board or to the jury. He claimed merely that he had no knowledge of the scheme until it was uncovered by the Navy Department investigators. (R. 93, 175, 188.) Petitioner's contention in this respect was fairly summarized in the judge's charge to the jury.* The jury found against petitioner on

* After reviewing the facts of the lumber deal, the judge stated "his [petitioner's] position about the matter is that he did not know about it and he did not learn about it until a month later, when Lieutenant Commander Seidman came to Elkton and investigated the accounts and called it to his attention. And he said that he disapproved of it and he would try to see that these young men would pay back the money. I think ultimately the money was paid

this issue, and, we submit, the evidence amply supports its verdict. There was direct testimony by the contractor, Jackson, that petitioner had authorized payment of the lumber bill (*supra*, p. 11). The jury was entitled, of course, to believe Jackson's testimony (which was first adduced by petitioner's counsel on cross-examination (R. 55)) as against petitioner's denial when he took the stand on his own behalf. (R. 176, 178). The jury was also entitled to infer that, inasmuch as the Elk Mills building had been substantially completed and Jackson had already been paid by July 21, 1942, petitioner knew that when his nephew referred to the lumber bill he was not talking about any outside lumber purchased by Jackson. Furthermore, the arrangement for the exchange of checks with Jackson was made by petitioner's nephew who, by petitioner's own admission, was included in the Elk Mills' scheme on petitioner's insistence, although he had not been included in the original plan. (R. 183.) The other four beneficiaries of the lumber deal were employees of Triumph, which was controlled by petitioner

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back to Triumph, or to Elk Mills and thus finally, to Triumph. * * *

"And the Government contends that Mr. Kann did know all about it. The evidence as to that is general rather than specific except in so far as Jackson's personal testimony is concerned, which you will recall. And the Government asks that you find from the evidence that this was a part of the whole scheme whereby profits were to be siphoned from Triumph to the key men, including this check particularly." (R. 227.)

and Decker, and these men constituted only a minority of Elk Mills' stockholders and board of directors. Under these circumstances the jury might reasonably have concluded that the five individuals who were owners of Elk Mills stock would not have carried on the fraudulent lumber deal without being certain of petitioner's active approval and cooperation. It is not uncommon for a defendant, after fraud has been discovered, to claim ignorance of the reprehensible activities carried on by persons with whom he has been associated, but courts and juries alike have usually found such a plea of ignorance unconvincing when made by a person in active control of the enterprise. *United States* v. *Mortimer*, 118 F. (2d) 266, 268 (C. C. A. 2), certiorari denied, 314 U. S. 616; *Hyney* v. *United States*, 44 F. (2d) 134, 137 (C. C. A. 6), certiorari denied, 283 U. S. 824; *Lewy* v. *United States*, 29 F. (2d) 462, 464 (C. C. A. 7), certiorari denied, 279 U. S. 850; *Bettman* v. *United States*, 224 Fed. 819, 827–828 (C. C. A. 6), certiorari denied, 239 U. S. 642; cf. *Gates* v. *United States*, 122 F. (2d) 571, 579 (C. C. A. 10), certiorari denied, 314 U. S. 698.

The function of this Court, with respect to questions of this nature, is "only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 254; *Burton* v. *United*

States, 202 U. S. 344, 373. We submit there was such evidence of a scheme to defraud and of petitioner's knowing participation therein.

II

THERE WAS SUBSTANTIAL EVIDENCE THAT THE MAILS WERE USED IN EXECUTION OF THE FRAUDULENT SCHEME

The question raised by petitioner as to the use of the mails is also essentially a challenge to the sufficiency of the evidence. Since none of the defendants actually mailed the checks which form the basis of the indictment, the Government was required to prove (1) that the defendants caused the mails to be used, and (2) that the use of the mails was in execution of the fraudulent scheme. The trial judge carefully instructed the jury that the use of the mails was not a mere technicality but was a "substantial thing"; that the use of the mails was "the gist of the offense" without which the federal courts would have no jurisdiction to punish the defendants (R. 223, 224).

A. *Causing the use of the mails.* It is well established that a person may cause the use of the mails even though he himself does not perform or direct the act of mailing. If he intentionally sets in motion a train of circumstances which have as their natural and probable consequence the use of the mails, the act of mailing, although by an innocent instrumentality, is his act for which he may

be held criminally responsible. *United States* v. *Kenofskey*, 243 U. S. 440, 443; *Graham* v. *United States*, 120 F. (2d) 543, 546 (C. C. A. 10); *United States* v. *Weisman*, 83 F. (2d) 470, 474 (C. C. A. 2), certiorari denied, 299 U. S. 560; *Corbett* v. *United States*, 89 F. (2d) 124 (C. C. A. 8); *Smith* v. *United States*, 61 F. (2d) 681, 684 (C. C. A. 5), certiorari denied, 288 U. S. 608; see also *Demolli* v. *United States*, 144 Fed. 363, 365–366 (C. C. A. 8). The question of the degree of foreknowledge required is not here presented. The trial judge charged the jury that the mailing "must reasonably have been foreseen—more than possibly." (R. 225.) Petitioner did not below and does not here attack the correctness of the charge.[1]

Whether, under the circumstances of a par-

[1] This is a somewhat stricter requirement than that set forth in *United States* v. *Weisman*, 83 F. (2d) 470, 474 (C. C. A. 2), certiorari denied, 299 U. S. 560, in which the foreknowledge required was defined as "at most that the steps taken to execute the fraudulent scheme may under the circumstances known to the defendant naturally and probably result in the use of the mails." There is a decision of the Fifth Circuit that the train of circumstances must be such that they will "inevitably" cause the use of the mails. *Spillers* v. *United States*, 47 F. (2d) 893 (C. C. A. 5). This holding was in effect overruled by the decision of the same court in *Smith* v. *United States*, 61 F. (2d) 681, certiorari denied, 288 U. S. 608, in which Judge Foster, who wrote the majority opinion in the *Spillers* case, dissented. The later decisions of the Fifth Circuit in *Hart* v. *United States*, 112 F. (2d) 128, certiorari denied, 311 U. S. 684, and *Lamb* v. *United States*, 115 F. (2d) 157, show that the rule of reasonable foreseeability is established in that circuit.

ticular case, the use of the mails could reasonably have been foreseen is plainly a question of fact for determination by the jury. Petitioner does not contend that the evidence was insufficient to show the necessary causation. Admittedly, the checks which form the basis of the indictment were cashed or deposited by the payees, petitioner's codefendants, in towns some distance away from the banks on which the checks were drawn. The persons so depositing or cashing the checks must have known that, in accordance with established banking practice,[6] the paying banks would, as they did, forward the checks by mail to the banks on which they were drawn. The jury could well find that the payees thus "caused" the use of the mails through the instrumentality of the banks. *United States* v. *Feldman,* 136 F. (2d) 394, 396 (C. C. A. 2), affirmed on other grounds, May 29, 1944, No. 193, 1943 Term; *Hart* v. *United States,* 112 F. (2d) 128, 131 (C. C. A. 5), certiorari denied, 311 U. S. 684; *United States* v. *Lowe,* 115 F. (2d) 596 (C. C. A. 7), certiorari denied, 311 U. S. 717; *Goodman* v. *United States,* 97 F. (2d) 197, 199 (C. C. A. 3), certiorari dismissed, 305 U. S. 578;

[6] Knowledge of the custom among banks of forwarding out-of-town checks through the mails is imputed to persons of ordinary business experience. *Spear* v. *United States,* 246 Fed. 250, 251 (C. C. A. 8), certiorari denied, 246 U. S. 667. See also *Shea* v. *United States,* 251 Fed. 440, 447 (C. C. A. 6), certiorari denied, 248 U. S. 581; *United States* v. *Decker,* 51 F. Supp. 15, 18 (D. Md.), affirmed, 140 F. (2d) 378 (C. C. A. 4), certiorari denied, 321 U. S. 792.

Federman v. *United States,* 36 F. (2d) 441, 442 (C. C. A. 7), certiorari denied, 281 U. S. 729; *Tincher* v. *United States,* 11 F. (2d) 18, 21 (C. C. A. 4), certiorari denied, 271 U. S. 664; *Savage* v. *United States,* 270 Fed. 14, 21 (C. C. A. 8), certiorari denied, 257 U. S. 642; *Shea* v. *United States,* 251 Fed. 440, 448 (C. C. A. 6) certiorari denied, 248 U. S. 581; *Spear* v. *United States,* 246 Fed. 250, 251 (C. C. A. 8), certiorari denied, 246 U. S. 667.

Petitioner did not himself cash or deposit the checks. He was, however, as the jury justifiably found, a party to the scheme to defraud. Having thus, with criminal intent, joined himself with the others to accomplish a common criminal end, he became liable as a conspirator for the acts performed by his codefendants in furtherance of the common design. *Blue* v. *United States,* 138 F. (2d) 351, 359 (C. C. A. 6), certiorari denied May 1, 1944, No. 789, 1943 Term; *Steiner* v. *United States,* 134 F. (2d) 931, 934 (C. C. A. 5), certiorari denied, 319 U. S. 774; *Weiss* v. *United States,* 120 F. (2d) 472, 475 (C. C. A. 5), rehearing denied, 122 F. (2d) 675, certiorari denied, 314 U. S. 687; *Baker* v. *United States,* 115 F. (2d) 533, 540 (C. C. A. 8), certiorari denied, 312 U. S. 692; *Alexander* v. *United States,* 95 F. (2d) 873 (C. C. A. 8), certiorari denied, 305 U. S. 637; *Spivey* v. *United States,* 109 F. (2d) 181, 184 (C. C. A. 5), certiorari denied, 310 U. S. 631; *Sasser* v. *United*

States, 29 F. (2d) 76 (C. C. A. 5), certiorari denied, *sub nom. Russell* v. *United States*, 279 U. S. 836; *Campbell* v. *United States*, 12 F. (2d) 873, 875 (C. C. A. 9); *Silkworth* v. *United States*, 10 F. (2d) 711, 717 (C. C. A. 2), certiorari denied, 271 U. S. 664; *Tincher* v. *United States*, 11 F. (2d) 18, 21 (C. C. A. 4), certiorari denied, 271 U. S. 664; *Grant* v. *United States*, 268 Fed. 443, 446 (C. C. A. 6), certiorari denied, 256 U. S. 700; *Freeman* v. *United States*, 244 Fed. 1, 17–18 (C. C. A. 7), certiorari denied, 245 U. S. 654. While some of the cases cited seem to hold that, if any one of joint defendants knowingly uses or causes the mails to be used in execution of the scheme, his confederates are liable irrespective of whether they contemplated the use of the mails as part of the scheme,[9] the trial judge in the instant case instructed the jury, in accordance with the more narrow rule laid down in most of the cases, that in order to hold the defendant liable the jury must find that the use of the mails was "part of the whole plan" (R. 224):

> * * * although the defendant did not personally mail them [the checks], if he was a party to the scheme with others which involved obtaining the fruits of this scheme by the use of the mails and that some of the

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[9] See *Weiss* v. *United States*; *Alexander* v. *United States*; *Sasser* v. *United States* and *Tincher* v. *United States*, *supra*.

> others, active parties to the whole scheme, did the mailing, the defendant would be bound by that if the mailing was in execution of the scheme. (R. 232.)

This charge was clearly correct. The intent to use the mails is not a necessary element of the offense defined by Section 215 of the Criminal Code. *United States* v. *Young*, 232 U. S. 155; *Silkworth* v. *United States*, 10 F. (2d) 711 (C. C. A. 2), certiorari denied, 271 U. S. 664. The scheme may have been carefully designed to avoid the use of the mails but, if the mails are in fact used in execution of the scheme, the statute is violated. *Bogy* v. *United States*, 96 F. (2d) 734 (C. C. A. 6), certiorari denied, 305 U. S. 608; *Freeman* v. *United States*, 244 Fed. 1, 17 (C. C. A. 7), certiorari denied, 245 U. S. 654. However, where the liability of one of the joint defendants depends upon an act of mailing performed by a codefendant, most of the cases hold that use of the mails must have been reasonably foreseeable. See, e. g., *Freeman* v. *United States*, 244 Fed. 1, 17–18 (C. C. A. 7), certiorari denied, 245 U. S. 654;

R. S. § 5480, from which Section 215 is derived, had proscribed use of the mails in execution of a scheme to "be effected by either opening or intending to open correspondence or communication with any other person." The elimination of this phrase from Section 215 by the codifiers in 1909 (35 Stat. 1130) necessarily implied that an intent to use the mails was no longer an essential ingredient of the offense. See *United States* v. *Young*, 232 U. S. 155, 161, cited approvingly by Mr. Justice Holmes in *Badders* v. *United States*, 240 U. S. 391, 394.

Spivey v. *United States*, 109 F. (2d) 181, 184 (C. C. A. 5), certiorari denied, 310 U. S. 631. The basis of this rule has not been articulated in the decisions; but would seem to rest on the principle that, in order to hold a person liable for the acts of coconspirators, the conspiracy must envision the crime. Cf. *United States* v. *Crimmins*, 123 F. (2d) 271, 273 (C. C. A. 2). However, just as in a conspiracy, a person may be bound by the acts of his coconspirators in furtherance of a conspiracy although he has no knowledge of the particular act performed,[11] so, in a mail fraud prosecution against a number of defendants, if the use of the mails in execution of the scheme is reasonably to be foreseen, a defendant is liable for mailings performed or caused by his codefendants although he was not aware of the specific use of the mails which forms the basis of the indictment. *Clarke* v. *United States*, 132 F. (2d) 538, 540 (C. C. A. 9), certiorari denied, 318 U. S. 789; *Spivey* v. *United States*, 109 F. (2d) 181, 184 (C. C. A. 5), certiorari denied, 310 U. S. 631; *Shreve* v. *United States*, 103 F. (2d) 796, 813 (C. C. A. 9), certiorari denied, 308 U. S. 570; *Hallowell* v. *United States*, 253 Fed. 865, 868 (C. C. A. 9), certiorari denied, 249 U. S. 615.

There can be no question that under the evi-

[11] *Bannon and Mulkey* v. *United States*, 156 U. S. 464, 468; *United States* v. *Manton*, 107 F. (2d) 834, 848 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Allen* v. *United States*, 4 F. (2d) 688, 692 (C. C. A. 7), certiorari denied, *sub nom. Hunter* v. *United States*, 267 U. S. 597).

dence in this case the jury was entitled to infer that the scheme in which petitioner participated was one which contemplated use of the mails. When the trial judge, at petitioner's request, instructed the jury that the direction to the postmaster at Elkton for the deposit of Elk Mills mail in Triumph's mail box (R. 228) had "no probative force in determining whether or not the defendant mailed or caused to be mailed the checks mentioned in the second and third counts of the indictment" (R. 228), he was being more favorable to petitioner than was required. The judge's charge in chief had been more accurate in stating that the direction to the postmaster was "no evidence standing merely by itself that these two checks were sent in execution of a scheme" (R. 223). The fact that extensive use of the mails was known to have been necessary as part of the organization of Elk Mills was a factor which the jury should have been allowed to consider in determining whether petitioner was a party to a scheme which contemplated the use of the mails. Even without the aid of this evidence, however, the jury was justified in finding that, since the scheme charged in the indictment contemplated the setting up of Elk Mills as an active business corporation, it was necessary to use the mails to effectuate that scheme. Moreover, there was proof that at least one of the directors of Elk Mills, petitioner, resided outside of Elkton and, under the Elk Mills by-laws, notices of directors' meetings could be

sent to him by mail (Ex. 16, Art. II, Par. 6). The holding of directors' meetings was, of course, a necessary part of the scheme charged in the indictment to divert profits from Triumph to the individual defendants through the superficially legitimate Elk Mills device. Even assuming that the jury was required to find under this charge that petitioner contemplated the use of the mails by the forwarding of checks, there was ample evidence to warrant such an inference. The scheme proved necessarily involved the issuance of a number of checks to petitioner and the other defendants for salaries, bonuses, dividends, etc. Petitioner lived in Pittsburgh (R. 165); and the defendant Willis had a bank account in Newark, Delaware (R. 37). It certainly was reasonably foreseeable that one or the other of these defendants, and perhaps some of the others as well, would deposit Elk Mills' checks drawn on the bank at Elkton in their own banks outside of Elkton and that those banks would necessarily be obliged to forward the checks to Elkton for collection. Indeed, petitioner himself deposited his $5,000 bonus check in a Pittsburg bank (R. 6A).

B. *Use of the mails in execution of the scheme.* Section 215 of the Criminal Code provides for the punishment of persons who, having devised a scheme to defraud, use the mails "for the purpose of executing such scheme or artifice or attempting so to do * * *." The matter mailed, although it need not on its face disclose the fraudulent pur-

pose or be effective in carrying out the scheme,[12] must, in some manner, be for the purpose of executing or furthering the scheme to defraud. *Clarke* v. *United States*, 132 F. (2d) 538, 541 (C. C. A. 9), certiorari denied, 318 U. S. 789; *United States* v. *Riedel*, 126 F. (2d) 81 (C. C. A. 7); *United States* v *Lowe*, 115 F. (2d) 596, 598 (C. C. A. 7), certiorari denied, 311 U. S. 717; *Barnes* v. *United States*, 25 F. (2d) 61, 64 (C. C. A. 8), certiorari denied, 278 U. S. 607. Hence, it is undisputed that, if the scheme has wholly ended, a subsequent mailing cannot be in execution of the scheme and cannot be a crime under the statute. *Mitchell* v. *United States*, 118 F. (2d) 653, 655 (C. C. A. 10); *McNear* v. *United States*, 60 F. (2d) 861 (C. C. A. 10).

We are thus brought to the question whether the scheme had in fact terminated before the mailing of the checks charged in the indictment. Petitioner contends that the scheme ended when the payees cashed their checks, since the defrauders had attained their objective, the money, and Triumph had been damaged beyond repair in that the drawers of the checks could not have refused

[12] *Durland* v. *United States*, 161 U. S. 306; *Holmes* v. *United States*, 134 F. (2d) 125, 134 (C. C. A. 8), certiorari denied, 319 U. S. 776; *Stumbo* v. *United States*, 90 F. (2d) 828, 832 (C. C. A. 6); *Barnes* v. *United States*, 25 F. (2d) 61, 64 (C. C. A. 8), certiorari denied, 278 U. S. 607; *Newingham* v. *United States*, 4 F. (2d) 490, 492 (C. C. A. 3), certiorari denied, 268 U. S. 703.

payment to the banks as holders in due course.[13] We do not believe, however, that the cases cited by petitioner stand for any such rigid rule. We think that those cases, particularly when considered in the light of other decisions in the same and other circuits, are merely applications to their

[13] It should be noted that petitioner's argument is based entirely on the premise that both indictment checks were cashed. There is no evidence that the bonus check of the defendant, Willis, which forms the basis of the third count of the indictment, was in fact cashed. The stipulation in respect of the use of the mails provides that this check was "deposited by V. G. Willis, Jr., payee, in a bank account maintained by him, V. G. Willis, Jr., in the Farmers Trust Company of Newark, Delaware, and said bank in the usual course of business caused said check to be cleared by the use of the United States mails" (R. 37–38). Since the stipulation expressly stated that the check forming the basis of the second count was "cashed" it is a natural inference that the Willis check was merely deposited in the usual course and mailed for collection. On this basis, the mailing of the bonus check would unquestionably be in execution of the fraud, since the collection of the funds was a necessary step in obtaining the money which was the object of the conspiracy. *Savage* v. *United States*, 270 Fed. 14, 21 (C. C. A. 8), certiorari denied, 257 U. S. 642; *Spear* v. *United States*, 246 Fed. 250, 251 (C. C. A. 8), certiorari denied, 246 U. S. 667. However, it is true, as petitioner contends, that neither the Government nor the court placed any particular stress on this difference in the circumstances under which the mailing of the two indictment checks occurred. For the reasons set forth in the text, we believe that the verdict may be sustained as to both counts on the assumption that both checks were cashed. Petitioner's prison sentence is less than the maximum which could have been imposed on one count, but, in order to sustain his fine in the amount that it exceeds $1,000, the conviction must be sustained on both counts.

particular facts of the general principle that there must be a scheme in existence and that the mailing must be in furtherance of such a scheme. In all the cases cited by petitioner, the courts found that the relationship between the defrauder and his victim had in a practical, non-technical sense ended before the mailing occurred. Thus, in *Stapp* v. *United States*, 120 F. (2d) 898 (C. C. A. 5), the victim purchased with his own personal check a cashier's check which he delivered to the defendant. The cashier's check was paid to the defendant by the bank on which it was drawn and was not mailed at all. The check which was mailed was the personal check of the victim drawn on the victim's own bank. The decision in the *Stapp* case rests in part, therefore, on the finding that defendant had done nothing to "cause" the mailing. Moreover, the defendant in that case did not plan to obtain any further funds from his victim and the clearing of the victim's check would have had no effect in aiding the defendant to keep the money he had obtained, since he had already absconded with the fruits of his crime before the mailing occurred. A similar situation was presented in *United States* v. *McKay*, 45 F. Supp. 1001 (E. D. Mich.), in which the scheme charged was one to defraud Edsel Ford by causing him to pay money to Bass-Luckoff, Inc., on the false representation that funds were due that company in connection with a political campaign.

Bass-Luckoff, Inc., in turn purchased a cashier's check which it delivered to McKay for part of the proceeds, and gave McKay its own check for the other part. McKay cashed these Bass-Luckoff checks, and they were then mailed to the Bass-Luckoff bank in Detroit. In dismissing the indictment, the court held that the scheme charged in the indictment was one to defraud Ford, that Ford had parted with his money before the mailings occurred, and the mailings were, therefore, not in execution of the scheme. Clearly, the basis of the decision was not merely that McKay had cashed the checks but that all relationships between McKay and Ford had ceased before the mailing occurred.[14] In *Dyhre* v. *Hudspeth*, 106 F. (2d) 286, 288 (C. C. A. 10), the scheme involved was one to defraud various business houses by passing worthless checks in return for merchandise. However, each count of the indictment charged the defrauding of a separate corporation. In holding that the indictment did not state an offense and that petitioner was entitled to his release on habeas corpus, the court emphasized the fact that each victim was "sepa-

[14] The court did not consider the question of whether the mailing of the checks was part of the scheme to defraud in that the Bass-Luckoff checks represented a division of the spoils. Cf. *Tinchex* v. *United States*, 11 F. (2d) 18, 21 (C. C. A. 4), certiorari denied, 271 U. S. 664. See also *McDonald* v. *United States*, 89 F. (2d) 128, 133 (C. C. A. 8), certiorari denied, 301 U. S. 697.

rately defrauded by representations made to him alone * * *". There, also, the decision was based upon the finding that, as between defrauder and victim, the scheme had wholly ended before the mailings occurred. Cf. *Rosenbloom* v. *Hunter*, 143 F. (2d) 673 (C. C. A. 10).

On the other hand, there are many cases in which the mere receipt of the money has been held not to mark the end of the scheme. Thus, where, after the money is received, the mails are used to avoid detection and to give the wrongdoers an opportunity to make use of the money fraudulently obtained, the mailings are regarded as in execution of the scheme. *United States* v. *Riedel*, 126 F. (2d) 81, 83 (C. C. A. 7); *Davis* v. *United States*, 125 F. (2d) 144 (C. C. A. 6); *Brady* v. *United States*, 26 F. (2d) 400, 401 (C. C. A. 9), certiorari denied, 278 U. S. 621; *Freeman* v. *United States*, 244 Fed. 1 (C. C. A. 7), certiorari denied, 245 U. S. 654. This rule has been applied to "lulling" letters closely related to the fraud even though there is no expectation that further funds will be received from the victim. *United States* v. *Riedel*, and *Davis* v. *United States*, *supra*. In schemes involving the "kiting" of checks, the money or credit is obtained immediately; but, since the lapse of time due to the mailing of the checks for collection enables the wrongdoers to make use of the proceeds or to perpetrate further frauds, the mailing of the "kited" checks has been held to be in execution of the scheme.

United States v. *Lowe,* 115 F. (2d) 596, 598–599 (C. C. A. 7), certiorari denied, 311 U. S. 717. See also *United States* v. *Feldman,* 136 F. (2d) 394, 396 (C. C. A. 2), affirmed on other grounds May 29, 1944, No. 193, 1943 Term; *Guardalibini* v. *United States,* 128 F. (2d) 984 (C. C. A. 5). Cf. *Hastings* v. *Hudspeth,* 126 F. (2d) 194, 196 (C. C. A. 10). In *Steiner* v. *United States,* 134 F. (2d) 931 (C. C. A. 5), certiorari denied, 319 U. S. 774, where the scheme was one to procure fraudulent tax reductions for property owners, the mailings charged in the indictment were bills sent to the property owners by the attorney involved in the scheme. The defendants contended that, since the object of the scheme was to defraud the State of Louisiana, the scheme was consummated at the instant the illegal tax assessments were entered on the books, and that the subsequent mailing of bills was therefore not in execution of the scheme. The Fifth Circuit, however, on the same interpretation of the fraudulent scheme, held that the mailings were in execution of the scheme to defraud the State, since the collection of the money from clients, although after the tax reductions had been entered, was necessary in order to enable the defendants to continue operations in the future. (134 F. (2d) at pp. 933–934). In *Dunham* v. *United States,* 125 F. (2d) 895 (C. C. A. 5), the scheme was one by an alleged "expert" in stock market operations to invest money for others. After he received some

money for investment, he sent out statements showing false profits and on the basis thereof received additional investments from persons previously defrauded and from others. While the court in its opinion merely stated that the mailing was clearly in execution of the scheme, the case is a further illustration of the fact that the Fifth Circuit, as well as the other circuits, adheres to the rule that a scheme is not necessarily ended by the receipt of money. See also *Guardalibini* v. *United States*, 128 F. (2d) 984 (C. C. A. 5).

The difference between responsibility under Section 215 for the use of the mails where the scheme has been wholly executed and where a scheme is still in existence, is illustrated by the decisions in *McNear* v. *United States*, 60 F. (2d) 861 (C. C. A. 10), and *Stewart* v. *United States*, 300 Fed. 769 (C. C. A. 8), both of which involved schemes to sell worthless lands. In the *McNear* case all the money due on the contract of sale had been collected before the mailing charged in the indictment occurred, and the court there held that the mailing was not in execution of the scheme. In the *Stewart* case, on the other hand, mailings at a time when notes given for part of the purchase price were still outstanding, were held to be in execution of an existing scheme. A rule similar to that in the *Stewart* case was applied in *Newingham* v. *United States*, 4 F. (2d) 490 (C. C. A. 3), certiorari denied, 268 U. S. 703, although, in the latter case, the scheme had collapsed before

payment of any of the monthly installments contemplated by the license contract there involved. That the determination of the mailing question necessitates a consideration of the scheme as a whole is also shown by the two decisions of the Tenth Circuit in *Mitchell* v. *United States*, 118 F. (2d) 653, and 126 F. (2d) 550, certiorari denied, 316 U. S. 702. Mitchell was first tried under an indictment which charged that he represented himself to a named victim as the agent of a major oil company authorized to purchase oil leases at $50.00 per acre; that he stated to his victim that he knew a man who was willing to sell such leases at $10.00 per acre and that the company would then repurchase at the higher figure, whereas in fact Mitchell was actually engaged in trying to find purchasers for leases owned by one Dorothy Heard. The mailing charged in the indictment was the act of the victim in sending the assignment of a lease executed by Dorothy Heard to the Commissioner of Lands of New Mexico for recording, pursuant to directions given by Mitchell. Holding that the scheme charged was one to defraud only one person of a definite sum of money, and that the mailing of the assignment was no part of that scheme, the circuit court of appeals reversed Mitchell's conviction (118 F. (2d) 653). In the second case, however, the indictment charged a continuing scheme to defraud a number of people and alleged that, for the purpose of lulling the victims into a false sense of security

and to allow himself time to escape apprehension, Mitchell represented that the recording of the leases was necessary and that after they were duly recorded they could be sold at a large profit. Under this indictment, the court upheld the conviction based upon the mailings of leases to the Commissioner for recording (126 F. (2d) 550, certiorari denied, 316 U. S. 702). All these cases make it clear, we think, that whether the mails are used in execution of a scheme to defraud is essentially a question of fact to be determined in the light of all the circumstances, including the nature of the scheme, the intention to obtain further funds from the victim or others, and the means employed to avoid detection.

In the instant case, the trial judge charged the jury that "the Government must satisfy you beyond a reasonable doubt that the use of the mails was in connection with and in furtherance or in execution, as we say, of the scheme itself" (R. 223), that "as I say, you must find, if you do find, beyond a reasonable doubt that these checks were mailed in furtherance of a scheme. Otherwise, your verdict should be 'not guilty' ". (R. 228.) Considering the scheme involved in this case, we think that there was ample evidence to warrant the jury in finding that the mailings charged in the indictment were in furtherance of an existing scheme. While the trial judge in his charge did not refer to the scheme as a continuing

one, he did say that "the question is whether, in execution of the whole scheme, or as a part of it, the mails were used for the purpose of carrying through the scheme of getting the money" (R. 224) and that "it is sufficient if it [the mailing] was a part of the whole plan and was done by somebody else (R. 224). The "whole" scheme, charged in the indictment and established by the proof, was one to divert profits from Triumph to the individual defendants in the form of salaries, bonuses, dividends, and otherwise. The trial judge in his charge stated that the Government's contention was that the scheme was one "to siphon off" profits (R. 215; see also R. 217). The scheme was intended to continue beyond the receipt of the particular part of the profits represented by the indictment checks. It was intended to continue at least as long as Elk Mills was performing the incendiary bomb contract, and it actually did continue until terminated by the Navy Department investigation. The essence of the scheme was the appearance of legitimacy given to the fraudulent transactions. The salaries, the bonuses, the potential dividends could not have been paid under this particular scheme unless the payments were made in normal fashion by Elk Mills checks apparently for proper Elk Mills obligations. Once the fraud was discovered by nonconspirators interested in Triumph's finances, the enterprise was bound to terminate. Consequently, the routine clearance of

the checks, whether cashed or deposited, was a necessary part of the scheme as a whole. This was particularly true of the bonus checks, which were clearly a part of the continuous process of draining off Triumph's funds. As to this count, the facts are very similar to those presented in the case of *United States* v. *Decker*, 51 F. Supp. 15 (D. Md.), affirmed 140 F. (2d) 378 (C. C. A. 4), certiorari denied, 321 U. S. 792, where the scheme was one by Decker and the petitioner here to divert Triumph's funds to themselves by appropriating money fraudulently represented as commissions paid to Decker's secretary.[15] While the Government did not here, as in the *Decker* case, rely on other checks of a similar nature, the scheme here proved necessarily involved the issuance of checks for salaries, eventual dividends and probably other bonuses as well, over an extended period of time. Salaries were drawn by the defendants from Elk Mills long after the bonus checks were paid (R. 128, Govt. Ex. #14). Hence, the successful clearance of the bonus checks, like "lulling" letters, or the mailing of "kited" checks, was a means of enabling the defendants to conceal their fraud and to gain time to perpetrate other frauds. The mailing was properly found, therefore, to be in furtherance of an existing scheme.

We consider next the sufficiency of the evidence to show a use of the mails in furtherance of the

[15] Petitioner received a suspended sentence in that case.

lumber transaction, upon which the second count was based.

The jury found that the use of the mails in clearing the "lumber deal" check was in execution of the scheme to defraud. This was the check given by the contractor to the five defendants who were the individual owners of Elk Mills stock, ostensibly in payment for "their" lumber. The evidence provided ample support for this finding. It was a part of the scheme alleged and proved that these five defendants would acquire their stock from funds supplied directly or indirectly by Triumph. The evidence showed that the contractor would not issue his check until he received Triumph's check for exactly the same amount. (R. 51, 52, 54, 64, 68.) The evidence also showed that petitioner approved the payment by Triumph (R. 55). The result of the transaction was to mulct Triumph for the benefit of the defendants, which was the essence of the broad scheme alleged. Although the payees of the check retained its proceeds, and did not use it to pay for the land, it was a fair inference from the evidence that they intended to utilize this means of getting the money to pay for the land, which in turn was to be used as the consideration for forty-five percent of the Elk Mills stock. The use of the mails to clear this check was, therefore, an integral step in the carrying forward of the scheme, and hence in execution of it. It cannot be said that the payees

of this check, upon receiving payment upon it, were thereafter not concerned whether the check cleared. Unlike the defendant in *Dyhre* v. *Hudspeth, supra,* the defendants were not absconders, who did not care what happened after they cashed the check. These defendants had responsible positions with Triumph, all lived in the vicinity of Elkton, and would have had to make the check good if it had not been paid when presented through the mails by the Elkton bank for payment. Their scheme was not complete when they obtained the cash on this check; it was only beginning.

Obtaining the $12,000 for the lumber was not the end of the scheme even if the lumber deal is considered as an isolated transaction; it was merely one step in the plan to have the employee defendants obtain for an apparently valuable consideration their stock interest in Elk Mills. This count of the indictment thus came within the rule that the scheme is not complete until its objective has been fully attained. It resembles *United States* v. *Kenofskey,* 243 U. S. 440, 443, where the acts of an insurance agent in causing his superintendent to send out false insurance claims were held to be in execution of the scheme, since payment and receipt of the claims were yet to come. See also *Bogy* v. *United States,* 96 F. (2d) 734 (C. C. A. 6), certiorari denied, 305 U. S. 608, where one defendant, Bogy, was under an obligation to de-

liver bonds to purchasers and another defendant, Spaulding, induced those purchasers to give him a power of attorney to secure those bonds, intending to release Bogy from liability on payment of a much smaller sum than the bonds were worth. Letters sent by Bogy after the power of attorney had been given to Spaulding were held to be in execution of the scheme, although the power of attorney was sufficient for Spaulding's purposes, since the transaction as a whole was not complete until Bogy was released from liability. Until the defendants in this case not only had the money, but were certain that their possession would not be questioned, they could not, and did not, use the money to pay for the land. Hence, the clearance of the check given to them by the contractor was a necessary step in furtherance of the scheme as a whole.

Wholly apart from the continuing nature of the scheme or schemes to defraud, we think that the rule for which petitioner contends would result in an artificial and unrealistic interpretation of the mail fraud statute. The statute punishes anyone who "shall, for the purpose of executing such scheme * * * place, or cause to be placed any letter," etc., in the mails. Unquestionably, the cashing of a check given to a defrauder as his share or part of his share of the proceeds of a scheme is in execution thereof. By that very act, however, when the check is cashed

at an out-of-town bank, the defrauder sets in motion the train of circumstances which necessarily causes the use of the mails. His act in cashing the check is, therefore, an act causing the mails to be used in execution of the scheme. If the mailing of a letter, *e. g.*, in the acceptance of a contract, were the last act necessary to complete a scheme to defraud, there would be no doubt that the mailing was in execution of the scheme, even if receipt of the letter was not essential to its consummation. The cashing of the check in order to obtain the spoils is, essentially, of the same nature. Instead of performing the mailing, the defrauder "causes" the use of the mails. Since by his own act he brings about the use of the mails as an essential part of his scheme, he ought not to be allowed to escape liability on the theory that he is not concerned with the use of the mails. This seems to be the rationale of *Hart* v. *United States,* 112 F. (2d) 128 (C. C. A. 5), certiorari denied, 311 U. S. 684, and *Tincher* v. *United States,* 11 F. (2d) 18 (C. C. A. 4), certiorari denied, 271 U. S. 664, both of which involved situations where the checks were cashed. Petitioner contends that the courts in those cases failed to note the distinction between checks sent for collection and checks which were cashed, but the petitions for certiorari in the *Hart* case (Nos. 332 and 339, October Term, 1940) placed particular stress on that

factor, making substantially the same argument as petitioner does here with respect to the status of the bank as a holder in due course. We believe that in both these cases the courts attached no significance to the cashing of the checks, in view of the defendants' deliberate acts which caused the use of the mails. The *Stapp* case, 120 F. (2d) 898 (C. C. A. 5), is not in conflict with the *Hart* decision for, as we have shown (*supra*, p. 38), Stapp did not cause the mailing of the check there involved. *Dyhre* v. *Hudspeth*, 106 F. (2d) 286 (C. C. A. 10), is somewhat closer, since under the indictment involved in that case, the defendant must have known that the worthless checks which he gave for the merchandise would be mailed. His act was not, however, the direct cause of the mailing in the same way as the cashing of an out-of-town check in order to collect the proceeds, since there the defendant did not himself use the banking facilities.[16]

The only case which, on its facts, seems to conflict with the proposition for which we contend is *United States* v. *McKay*, 45 F. Supp. 1001 (E. D. Mich.). There, as we have noted (*supra*, p. 39, n. 14), the court adopted an extremely narrow

[16] The *Dyhre* case is, in any event, questionable authority in view of the check-kiting cases (see *United States* v. *Lowe*, 115 F. (2d) 596, 598–599 (C. C. A. 7), certiorari denied, 311 U. S. 517) for it would appear that, as in check-kiting, the defendant utilized the lapse of time to perpetrate other frauds.

view of the scheme to defraud, considering only the time when the victim had parted with his money and failing to realize that the scheme was not complete until the defrauder had obtained his spoils. It may be that, where the act of causing the use of the mails is the last act in execution of the scheme, the train of causation must be more direct than that necessary to show causation generally under the statute (see *supra*, p. 28, n. 7). But where, as here, the use of the mails is the necessary, almost inevitable, result of the means employed by a defrauder to obtain the proceeds of his crime, we think that the use of the mails should be considered in execution of the scheme, even in situations where the defrauder absconds after cashing the check. Moreover, where, as here, the defrauder does not intend to abscond but utilizes his regular banking facilities for clearance of the check, there is an additional factor to be considered. Whatever the technical legal rights involved, a person cashing a check in his own bank where he regularly does business is not, in a practical sense, assured of his unquestioned right to retain the proceeds of that check until it has successfully cleared the bank on which it is drawn. It is common knowledge that, if objection is raised to the payment of a check cashed for a depositor, banks look to the depositor for reimbursement before seeking to enforce their rights against the drawer as a holder

in due course. Hence, in such situations, there is no substantial practical distinction between checks deposited for collection and checks which are cashed. In both instances, the use of the mails is necessary to complete the fraud. *Hart* v. *United States*, 112 F. (2d) 128 (C. C. A. 5), certiorari denied, 311 U. S. 684; *Tincher* v. *United States*, 11 F. (2d) 18, 21 (C. C. A. 4), certiorari denied, 271 U. S. 664; *Decker* v. *United States*, 140 F. (2d) 378, 379 (C. C. A. 4), certiorari denied (321 U. S. 792).[17]

CONCLUSION

Under fair and proper instructions the jury determined the issues of fact against petitioner as to both elements of the offense, the existence of a scheme to defraud and the use of the mails in execution thereof. The Circuit Court of Appeals found that the verdict was sustained by substantial evidence. None of the contentions urged by petitioner, we submit, brings into question "the concurrence of both courts below in the sufficiency of the jury's verdict." *United States* v. *Johnson*,

[17] The fact that the checks involved in this case were not Triumph's checks but were checks drawn by Elk Mills and by the contractor, is of no consequence, since the scheme (assuming that each check represented an independent scheme merely to obtain the money represented by the check), was not complete until the defendants were assured of their right to retain that money. Cf. *McDonald* v. *United States*, 89 F. (2d) 128, 133 (C. C. A. 8), certiorari denied, 301 U. S. 697.

319 U. S. 503, 518. We respectfully submit that the judgment of the court below should be affirmed.

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OCTOBER 1944.

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SUPREME COURT OF THE UNITED STATES.

No. 35.—October Term, 1944.

Gustav H. Kann, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[December 4, 1944.]

Mr. Justice Roberts delivered the opinion of the Court.

We took this case because it involves important questions arising under § 215 of the Criminal Code.[1] The section provides that "Whoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, . . . in any post office, or . . . cause to be delivered by mail according to the direction thereon, . . . any such letter, . . . shall be fined not more than $1,000, or imprisoned not more than five years, or both."

The petitioner and six others were indicted in three counts for using the mail in execution of a scheme to defraud. Petitioner's codefendants pleaded *nolo contendere*. He was tried and convicted on the second and third counts, and the Circuit Court of Appeals affirmed the conviction.[2]

The indictment alleged that Triumph Explosives, Inc. is a Maryland corporation engaged in the manufacture of munitions for the United States, a large amount of whose stock is held by the general public; that petitioner was President and a director, one of his co-defendants was an officer and director and five of them salaried executive and administrative employes of the company. The indictment continued that the defendants devised a scheme to defraud Triumph and its stockholders and obtain money for themselves by diverting part of the profits

[1] 18 U. S. C. § 338.

[2] 140 F. 2d 380.

of Triumph on its Government contracts to a corporation known as Elk Mills Loading Corporation and distributing such profits through salaries, dividends, and bonuses to be paid by Elk Mills to the defendants; that, in pursuance of the scheme, Elk Mills was organized, some defendants elected officers and directors, and others elected consultants at substantial salaries, and 49% of its stock distributed to five defendants, who were administrative employes of Triumph, without consideration; that Triumph, pursuant to the plan, subcontracted a Government contract to Elk Mills for 51% of the latter's stock, on a basis which would yield Elk Mills large profits, and would involve utilization of the employes and services of Triumph in the performance of the subcontract; and that the defendants, pursuant to the scheme, received from Elk Mills salaries and bonuses for which no substantial services were rendered, and dividends, to the detriment of Triumph. It was alleged that the fraudulent scheme was misrepresented upon the minutes of Triumph and false reasons for the transaction given. Further, that, pursuant to the scheme, it was to be represented that some of the defendants would purchase with their own money, and convey to Elk Mills, certain lands for the issue to them of 49% of the stock of Elk Mills, whereas it was not intended that these defendants should use their own funds in purchasing the land to be transferred in payment of the stock, and that this plan was carried out. In summary, it was charged that the scheme was such that Triumph should be deprived of the profits rightfully belonging to it and these profits should be distributed amongst the defendants through the instrumentality of Elk Mills; that bonuses were to be paid to each of the defendants out of the profits of Elk Mills, and such bonuses were paid.

In the first count it was charged that the defendants, for the purpose of executing the scheme, caused to be delivered by mail a check drawn by Elk Mills on the Peoples Bank of Elkton, Maryland, in favor of petitioner.[3] In the second, it was charged that, for the same purpose, the defendants caused to be placed in the post office at Elkton a check drawn by one Jackson on Industrial Trust Company of Wilmington, Delaware. In the third, it was charged that, for the same purpose, the defendants caused to be delivered by mail a check drawn by Elk Mills on the Peoples Bank of Elkton in favor of one of the defendants, Willis.

[3] The Government abandoned the first count at the trial.

At the trial the Government proved the corporate existence of Triumph, proved that Triumph held Government contracts, that Elk Mills was incorporated and became subcontractor of a Government contract, that the stock of Elk Mills was distributed amongst certain of the defendants and Triumph, as in the indictment alleged, that, under the subcontract, Elk Mills was in receipt of substantial profits and that these profits were used to pay salaries and bonuses to the defendants, including petitioner. The Government offered evidence tending to prove that certain of these actions had been concealed from other directors of Triumph and that the true situation was discovered when a federal officer made an audit of Triumph's transactions under Government contracts.

The petitioner offered evidence tending to prove that in order to expand Triumph's business two banks had loaned large sums to Triumph under written agreements which restricted the amount it could invest in capital assets and restricted the salaries and bonuses it could pay; that the four defendants who were executive employes were dissatisfied with their compensation and threatened to leave Triumph unless they should receive increased compensation; that the directors of Triumph devised the plan of incorporating Elk Mills and subcontracting with it to make possible the payment of salaries and bonuses without violating Triumph's agreements with its banks; that petitioner had no other motive in participating in the transactions relating to Elk Mills, and that, upon being advised of the arrangement, Triumph's banks were of opinion that it did not violate the agreements.

It was proved by the Government that one Jackson contracted with Triumph for the building of a factory for Elk Mills on land conveyed to Triumph by several of the defendants. Some of these defendants informed the contractor that he might use the timber standing on the land in the construction of the building. After he had done so they falsely represented to him that they owned the timber and that he must pay them some $12,000 for it. He did so, by a check, to their order, and, in turn, billed Triumph for the same amount. There was evidence that the petitioner was asked whether it was proper to pay the bill and that he stated he did not see why not. It is not contended that the petitioner received any of this money, and his evidence tended to show he had no knowledge of this fraud perpetrated on Triumph.

The use of the mails proved under count 2 was this: The check of Jackson, the contractor, for purchase of the timber, to the order of defendants Deibert, Feldman, Kann (not petitioner), Prial, and Willis, was by them endorsed and cashed at the Peoples Bank of Elkton, Maryland, and was, by that bank, deposited in the mail to be delivered to the bank in Wilmington, Delaware, on which it was drawn.

With respect to the third count, the proof was that Elk Mills delivered its check on the Peoples Bank of Elkton for $5,000 to Willis, one of the executive employes, as a bonus. It was endorsed by Willis and deposited with the Farmers Trust Company of Newark, Delaware. The Newark bank mailed the check to the Peoples Bank of Elkton.

The petitioner contends, first, that there is no substantial evidence that the transactions involving Elk Mills' subcontract were other than innocent transactions intended to finance the Government contracts held by Triumph, in conformity to that Company's agreements with the bank; or, if the transactions were for an improper purpose, there is no proof that he was a party to any improper use of funds. Secondly, the petitioner urges that he admittedly received no money from the checks which are described in counts 2 and 3, and there is no proof he had knowledge, or reasonable cause to believe, that the checks would go through the mails and, therefore, he did not cause them to be sent or delivered within the intent of the statute. Thirdly, he urges that the mailing of the checks by the paying banks could not be for the purpose of executing the scheme since the defendants to whom those checks were delivered had received the money represented by the checks and each transaction, after such receipt, was irrevocable as respects the drawer.

The petitioner strenuously argues his first contention, but, in the view we take of the case, we find it unnecessary to review the evidence, if we were otherwise inclined to do so in the face of the agreement of the courts below that a case was made for the jury on the question of the fraudulent nature of the scheme and the petitioner's participation in it.

With respect to the second contention, while there may be some question as to whether the defendants may be said to have "caused" the mailing of the checks, we think it a fair inference

that those defendants who drew, or those who cashed, the checks believed that the banks which took them would mail them to the banks on which they were drawn, and, assuming the petitioner participated in the scheme, their knowledge was his knowledge.[4]

The remaining contention is that the checks were not mailed in the execution of, or for the purpose of executing, the scheme. The check delivered to the five defendants by the building contractor in payment for timber they claimed to own was cashed by them at a local bank in Elkton, Maryland. By cashing it they received the moneys it was intended they should receive under the scheme. The Elkton bank became the owner of the check.[5] The same is true of the bonus check delivered to defendant Willis and deposited and credited to his account. The banks which cashed or credited the checks, being holders in due course, were entitled to collect from the drawee bank in each case and the drawer had no defense to payment. The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires.[6]

The case is to be distinguished from those where the mails are used prior to, and as one step toward, the receipt of the fruits of the fraud, such as *United States* v. *Kenofskey*, 243 U. S. 440.[7] Also to be distinguished are cases where the use of the mails is a means of concealment so that further frauds which are part of the scheme may be perpetrated.[8] In these the mailing has ordinarily

[4] Weiss v. United States, 120 F. 2d 472; Steiner v. United States, 134 F. 2d 931; Blue v. United States, 138 F. 2d 352.

[5] This is so under the Uniform Negotiable Instruments Act which has been adopted in Maryland and in Delaware. Anno. Code of Maryland 1939, Art. 13, Sec. 76; Revised Code of Delaware (1935), c. 78, Art. 4, Sec. 57. This Act has adopted the rule announced in Burton v. United States, 196 U. S. 283, 297; City of Douglas v. Federal Reserve Bank of Dallas, 271 U. S. 489, 492; Dakin v. Bayly, 290 U. S. 113, 146.

[6] McNear v. United States, 60 F. 2d 861; Dyhre v. Hudspeth, 106 F. 2d 288; Stapp v. United States, 120 F. 2d 898; United States v. McKay, 45 F. Supp. 1001.

[7] See also Shea v. United States, 251 Fed. 440; Spear v. United States, 228 Fed. 485; Savage v. United States, 270 Fed. 14; Stewart v. United States, 300 Fed. 769; Tincher v. United States, 11 F. 2d 18.

[8] See e. g. United States v. Lowe, 115 F. 2d 596; United States v. Riedel, 126 F. 2d 81; Dunham v. United States, 125 F. 2d 895.

had a much closer relation to further fraudulent conduct tha
has the mere clearing of a check, although it is conceivable th
this alone, in some settings, would be enough. The federal ma
fraud statute does not purport to reach all frauds, but only tho
limited instances in which the use of the mails is an [redacted] pa
of the execution of the fraud, leaving all other cases to be dea
with by appropriate state law.

The Government argues that the scheme was not complete, th
so long as Elk Mills remained a subcontractor the defendan
expected to receive further bonuses and profits and that the cle
ing of these checks in the ordinary course was essential to
further prosecution. But, even in that view, the scheme was co
pletely executed as respects the transactions in question wh
the defendants received the money intended to be obtained
their fraud, and the subsequent banking transactions between
banks concerned were merely incidental and collateral to t
scheme and not a part of it.

We hold, therefore, that one element of the offense defined
the statute, namely, that the mailing must be for the purpose
executing the fraud, is lacking in the present case. The judgm
must be reversed.

So ordered

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK, Mr. Just
JACKSON and Mr. Justice RUTLEDGE concur, dissenting.

I hardly think we would set this conviction aside if the collect
bank instead of cashing the checks took them for collection o
and refused to pay the defendants until the checks had b
honored by the drawee. It is plain that the mails would then
used to obtain the fruits of the fraud. And I do not see why
fraud fails to become a federal offense merely because the collect
bank cashes the checks. That would seem to be irrelevant un
these circumstances. As pointed out in *Decker* v. *United Sta*
146 F. 2d 378, 379, the object of the scheme was to defraud
unpaid, and the use of the mails was an essential step to that
It is true that the collecting bank was a holder in due co
against whom the drawer had no defense. But that does not

that the fraudulent scheme had reached fruition at that point of time. Yet if legal technicalities rather than practical considerations are to decide that question it should be noted that the defendants were payee-indorsers of the checks. They had received only a conditional credit, or payment as the case may be. It took payment by the drawee to discharge them from their liability as indorsers. Not until then would the defendants receive irrevocably the proceeds of their fraud.

Moreover, this was not the last step in the fraudulent scheme. It was a continuing venture. Smooth clearances of the checks were essential lest these intermediate dividends be interrupted and the conspirators be called upon to disgorge. Different considerations could be applicable if we were dealing with incidental mailings. But we are not. To obtain money was the sole object of this fraud. The use of the mails was crucial to the total success of the fraudulent project. We are not justified in chopping up the vital banking phase of the scheme into segments and isolating one part from the others. That would be warranted if the scheme were to defraud the collecting bank. But it is plain that these plans had a wider reach and that but for the use of the mails they would not have been finally consummated.